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No. 03-565

Supreme Court, U.S.
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In The

Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN
and KODAK RETIREMENT
INCOME PLAN COMMITTEE,

Petitioners,

v.

SALLY J. BURKE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a Summary Plan Description is defective in failing to alert a plan participant of the requirement of the filing of an Affidavit of Domestic Partnership in order to establish eligibility for survivor income benefits payable to a beneficiary upon the death of the plan participant prior to retirement, under an ERISA-covered Retirement Income Plan, was the Second Circuit correct in holding that circumstantial evidence offered by the beneficiary created a rebuttable presumption of likely prejudice as a result of the defect in the SPD entitling the plan beneficiary to Survivor Income benefits upon the failure of the plan administrator to establish proof sufficient to rebut the presumption?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The Respondent is Sally J. Burke, an individual. Petitioners are Kodak Retirement Income Plan and the Kodak Retirement Income Plan Committee. Neither of the Petitioners is a corporation and, therefore, neither issued any stock that is owned by any publicly-traded company. Eastman Kodak Company is not a party to this case, but is a publicly-held company.

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BRIEF IN OPPOSITION

Respondent, Sally J. Burke, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 336 F.3d 103 and the opinion of the District Court is reported at 217 F.Supp.2d 384.

COUNTER-STATEMENT OF THE CASE

There is no clear irreconcilable conflict among the various Circuit Courts on the issue that was actually decided by the Second Circuit in this case. The primary holding of the Court below involves the burden of proof placed upon a plan beneficiary as well as the Plan Administrator. Virtually every Circuit Court has held that when there is a conflict between a Summary Plan Description and the terms of the pension plan, the SPD controls. The Circuit Courts have imposed some additional requirement of proof in order for the beneficiary to recover under the plan terms. The Second Circuit adopted a "likely prejudice" standard and held that the plan beneficiary has the burden of proof of establishing that she was likely prejudiced by the defect in the SPD. A presumption then arises in favor of the beneficiary after this initial showing that she was likely to have been harmed. This presumption may then be rebutted by the Plan Administrator or employer through evidence that the deficient SPD was, in

effect, a harmless error. No other Circuit Court has dealt with the burden of proof issue and, therefore, there is no clear irreconcilable conflict among the various Circuit Courts on the issue.

Kodak's Retirement Income Plan provides Survivor Income Benefits for certain beneficiaries when the plan participant dies prior to retirement. In 1996, Kodak amended its Pension Plan to include "domestic partners" among the class beneficiaries entitled to Survivor Income Benefits. The terms of the pension plan set forth specific requirements for an individual to be considered a domestic partner under the terms of the plan. It also requires that the plan participant and beneficiary file an Affidavit of Domestic Partnership with the plan administrator attesting to the fact that they have met all of the criteria for being domestic partners. It is undisputed that Kodak publishes and distributes to its employees a company handbook of over 300 pages, which includes SPDs for each of its welfare plans and its SPD for its pension plan. It is further undisputed that the SPD for the pension plan does not alert the plan participant and/or beneficiary of the requirement of the filing of an Affidavit of Domestic Partnership in order to establish eligibility for Survivor Income Benefits on the part of the surviving domestic partner. It is further undisputed that the Respondent and the deceased plan participant met all of the criteria for being domestic partners with the exception of the filing of the Affidavit of Domestic Partnership with the plan administrator prior to the death of the plan participant. It is also undisputed that the issue giving rise to the present litigation did not occur until after the death of the plan participant, which precluded the Respondent from establishing what the plan participant did or did not rely upon

in connection with the defective SPD terms. Respondent seeks to recover Survivor Income Benefits based upon the clear factual establishment of her domestic partnership status, notwithstanding the failure to file the Affidavit of Domestic Partnership prior to the death of the plan participant.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Clear Irreconcilable Conflict Among The Various Circuit Courts On The Primary Issue Decided By The Second Circuit In This Case.

Virtually all of the Circuit Courts have held that when there is a conflict between an SPD and a Pension Plan, the SPD controls. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2nd Cir. 1990); *Burnstein v. Retirement Plan, Allegheny Health*, 334 F.3d 365, 378 (3rd Cir. 2003); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Senkier v. Hartford Life and Acc. Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991); *Baker v. Ceridian Corp.*, 122 F.3d 628, 633 (8th Cir. 1997); *Atwood v. Neumont Gold Co.*, 45 F.3d 1317, 1321 (9th Cir. 1995); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

In addition to requiring proof of the defect in the SPD, all Circuit Courts require some additional proof of the effect of that defect prior to recovery by a plan participant

or a beneficiary. The language chosen by the various courts in describing that additional quantum of proof has varied.

Contrary to assertions made by Petitioner in its brief, the Seventh Circuit has not directly held that a showing of detrimental reliance is necessary in order for a beneficiary or plan participant to recover benefits on the basis of a deficient SPD. In all three cases, the statements relied upon by Petitioner were in the form of dicta in the course of an opinion. In *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999), the issue facing the Court was whether the plan documents entitled the plan to reimbursement for medical expenses that were paid to a participant in accordance with an insurance policy providing coverage for an injury inflicted by an uninsured motorist. The Court held that there was no conflict between the plan provisions and the SPD and that decision was dispositive of the case. Although there are statements made in dicta that are being relied upon by Petitioner herein, the opinion clearly states that the Court was not ruling upon the issue of reliance in connection with conflicts between Summary Plan Documents and the plan wording itself. Specifically, the Court stated: "We need not get into the issue of reliance here, or weigh the significance of the fact that the Summary Plan Description states that 'in case of a conflict or discrepancy between this booklet and the actual Plan provisions, the provisions of the Plan, will govern your rights and benefits,' for there is no conflict between the descriptions." 187 F.3d at 24.

The Seventh Circuit's opinion in *Helfrich v. Carle Clinic Association, PC*, 328 F.3d 915 (7th Cir. 2003) also does not substantiate Petitioner's argument as to the position of the Seventh Circuit on this issue. In that case,

the Court held that the three documents that the Plaintiffs denominated Summary Plan Descriptions were not, in fact, Summary Plan Descriptions and were prepared by the employer rather than the plan. The Court, therefore, rejected the Plaintiff's claim that the brochures prepared and handed out by the employer overrode the terms of the pension plan in the same fashion that a defective Summary Plan Description would. The Court refused to extend the rule applicable to conflicts between Summary Plan Descriptions and plan provisions to other descriptive materials prepared and handed out by the employer to employees.

In *Andersen v. Chrysler Corporation*, 99 F.3d 846 (7th Cir. 1996), the Court declined to apply the general rule that the SPD would govern in conflicts between SPDs and plan provisions by reason of the fact that the plan provisions in the case before it were more favorable to the beneficiaries than were the provisions of the SPD. The Court concluded that the cases where an SPD was enforced over contradictory plan terms were situations where the SPD terms involved were more favorable to the plan participant or beneficiary. Since that was not the case before the Court, those rules of law did not have application.

The Third Circuit previously decided *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3rd Cir. 1991) and held, similar to the Seventh Circuit's decision in *Helfrich v. Carle Clinic Association, PC*, supra, that employer-provided booklets are not Summary Plan Descriptions. Although there was discussion in the opinion thereafter concerning conflicts between Summary Plan Descriptions and plan provisions, such comments were

clearly dicta. In any event, the Third Circuit, upon actually deciding the issue in a case clearly presenting it, held that a plan participant or beneficiary need not allege reliance or prejudice in asserting a claim for plan benefits on the basis of a conflict between an SPD and the plan document, *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365 (3rd Cir. 2003).

Opinions in five circuits have held that a plan participant or beneficiary may recover upon a showing of some degree of reliance or possible prejudice. *Govoni v. Bricklayers, Masons & Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984); *Aiken v. Policy Management Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 887-88 (8th Cir. 1999); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

Although Petitioner asserts that the Sixth Circuit requires a participant or beneficiary to show neither reliance nor possible prejudice as a result of a defective SPD in order to recover, a reading of the decision in *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988) clearly indicates that the Sixth Circuit flatly rejected a "detrimental reliance" standard and adopted a reliance or possible prejudice standard. The Court stated: " . . . the explicit language of the Summary could or would have caused Edwards and similarly situated unsophisticated lay employees to rely upon State Farm's inadvertent misrepresentation to their detriment." 851 F.2d at 136.

The primary holding of the Second Circuit in *Burke* concerns the burden of proof and the burden of going

forward with the evidence. The Court adopted a "likely prejudice" standard and held that a presumption of prejudice arises in favor of the plan participant or beneficiary when he has met his initial burden of showing that he was likely to have been harmed by the deficient SPD. At that point, the burden of going forward shifts to the plan administrator, who may rebut this presumption of likely prejudice by proof that the deficiency of the SPD was harmless error. By way of example, the Court stated that the presumption may be rebutted by proof that the participant was aware of the actual plan terms, notwithstanding the deficiency of the SPD.

Petitioner focuses on the language chosen by the Second Circuit in adopting the standard that is to be applied, as opposed to the quantum of proof required to meet that standard. Decisions in other Circuits which are relied upon by Petitioner to establish the conflict among the Circuits do not deal with the burden of proof issue which is the primary holding of the Court.

II. Whether Omissions In SPD's Should Be Treated The Same As Affirmative Misstatements Is An Issue Not Properly Raised In This Case.

Petitioner attempts to raise, for the first time in connection with its application to this Court, the issue of whether omissions in SPDs are to be treated the same as affirmative misstatements. This is an issue that was not raised at the Circuit Court level and the Second Circuit's decision does not address the issue. Therefore, it was not properly raised for argument in this Court.

In any event, the cases cited by Petitioner in support of its position are all cases arising under welfare plans

rather than pension plans. Congress has chosen to establish two separate categories of plans covered by ERISA. ERISA distinguishes between pension plans and welfare plans. A pension plan is one that provides retirement income to employees or provides for the deferral of income by employees. 29 U.S.C. § 1002(2). Welfare plans, on the other hand, include plans established for the purpose of providing health insurance, disability insurance and the like. 29 U.S.C. § 1002(1). Welfare plans are not subject to the same requirements under ERISA as are imposed upon pension plans. Compare 29 U.S.C. § 1051 *et seq.* with 29 U.S.C. § 1081 *et seq.* The disclosure requirements specified by ERISA and regulations promulgated thereunder are different in connection with pension plans as opposed to welfare plans.

For the reasons set forth above, the issue Petitioner attempts to raise concerning a split among the Circuits concerning the treatment of deficiencies in welfare plan SPDs depending upon whether the deficiency is an omission or a misstatement is not an issue that was raised in this case and, therefore, not appropriate for review by this Court.

CONCLUSION

It is respectfully requested that the Writ of Certiorari sought by Petitioner in this case be denied.

Respectfully submitted,

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